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DEC 3 1906
JAMES H. McKENN

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 875.

GEORGE BRADEN, - - - - - - - Appellant,

vs.

MORGAN TREAT, UNITED STATES MARSHAL, IN AND FOR THE EASTERN DISTRICT OF VIRGINIA, ET AL., - - - - - - - Appellees.

BRIEF FOR APPELLANT.

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Counsel for George Braden

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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 375.

GEORGE BRADEN, - - - - - - - - - *Appellant,*

vs.

MORGAN TREAT, UNITED STATES MARSHAL IN AND FOR THE EASTERN DISTRICT OF VIRGINIA, ET AL., - - - - - - - - - *Appellees.*

BRIEF FOR APPELLANT.

I have read the carefully prepared and able brief of the general counsel for the appellant in these and associated cases. It leaves very little to be said, but I wish to specially urge one point, and that is, that in all cases like these, the question of the jurisdiction of the court finding the indictment, is and must of necessity also be open to inquiry.

The appellant in this case was arrested in Richmond, Virginia, under the authority of Section 1014, Revised Statutes of the United States, for the purpose of being carried to the Middle District of Tennessee, to be tried upon an indictment there found, on the 26th of May, 1906, alleging against the appellant and others a conspiracy under the Sherman Anti-Trust Act. He was brought before Judge Waddill, District Judge for the Eastern District of Virginia, sitting at Richmond. He offered to show by himself and others that he did not,

within the Middle District of Tennessee, on the date named in the indictment, to-wit, the 8th of July, 1903, or during the period between the 8th of July, 1903, and the 1st of September, 1905, or at any time, engage in the alleged conspiracies, or any of them, in the indictment mentioned, or at any time, or at any place, join in or assent to said alleged conspiracies, or any of them, alleged to have been engaged in, or entered upon, in the Middle District of Tennessee; or that he at any time or at any place did any act in furtherance of, or to effect the object of the alleged conspiracies engaged in in the Middle District of Tennessee, or any of said alleged acts or conspiracies. Thereupon the counsel for the Government objected to the appellant being sworn, or to any evidence on the subject, proving or tending to prove any of the acts which would defeat the jurisdiction of the court, or in any wise bear upon the question as to whether the appellant had ever been guilty of any of the conspiracies or acts, or consented to or approved any of the conspiracies or acts said to have been committed in the Middle District of Tennessee. The District Judge sustained the objection of the Government, and refused to allow the appellant to be sworn or to testify, or introduce others to testify to any of the facts before stated. The appellant admitted that he was the person named in the indictment. The Government thereupon contended, and the District Judge decided, that the identity being admitted, the indictment in due form being presented, was *conclusive* of *every fact* therein stated, including the necessary facts upon which *jurisdiction rested,* and held that the question of jurisdiction was not open to inquiry. Appellant then presented his petition to the Circuit Court, held by Judge Goff, for writs of habeas corpus

and certiorari. Both writs were granted and issued, and returns duly made. The petition exhibited a copy of the record of proceedings before the District Judge, and also stated the evidence which the appellant offered, and asked permission to give, but which he was not allowed to give, under the peremptory orders of the District Judge. The Circuit Judge also declined to hear any evidence, and held that the identity being admitted, the indictment was *conclusive* evidence of every fact therein stated, including the necessary facts upon which *jurisdiction* rested, and this appeal is prosecuted.

There are many questions of very great interest in this case, but I will confine myself to the discussion of one, viz., that both the District Judge and the Circuit Judge erred in holding that the indictment was *conclusive* evidence of *jurisdictional* facts. The Circuit Judge rested his opinion on the case of Beavers v. Henkel, 194 U. S. 73, but this court in that case did *not* hold that the indictment was *conclusive* evidence, but only *prima facie* evidence, and in discussing the question this court gave very strong reasons which can be urged in support of the justice of an inquiry, by the court in which the habeas corpus proceedings are pending, into the question whether the court in which the indictment was found had *jurisdiction* to find it. In that case it was contended by counsel for the prisoner that the indictment had no probative force at all, and as opposed to this, the Government contended it was conclusive of every fact therein stated, and this court in discussing that question said:

> "While the indictment is *prima facie* evidence, it is urged that there are substantial reasons why it should not be regarded as conclusive. An investi-

gation before the grand jury, it is said, is generally ex parte—although sometimes witnesses in behalf of the defendant are heard by it—and the conclusion of such *ex parte* inquiry ought not to preclude the defendant from every defense, even the one that he was never within the State or district in which the crime is charged to have been committed, or authorize the Government to summarily arrest him wherever he may be found, transport him perhaps far away from his home, and subject him among strangers to the difficulties and expense of making his defense. It is unnecessary to definitely determine this question."

And then this court adds:

> "It is sufficient for this case to decide, as we do, that the indictment is *prima facie* evidence of the existence of probable cause."

And this court explained that that decision was not in conflict with Green v. Henkel, 183 U. S. 249, because in that case the court actually entered upon the inquiry, and the District Judge found the existence of probable cause. In Green's case, 52 Fed. 106, Judge Jackson distinctly held it was well settled that under the application for an order of removal, authorized by Section 1014, R. S., that the District Court or Judge might look into the indictment to ascertain, first, whether an offense against the United States had been charged, and, second, "whether the court to which the accused is sought to be removed *has jurisdiction of the same.*" And in the same opinion he said that before a trial could be had before any court of the United States, said court must have jurisdiction over the place, the person and the subject matter.

And in the case of Horner v. U. S., 143 U. S. 207, it was held that it was the duty of the District Judge, acting under Section 1014, to inquire into the question as to whether the court in which the indictment was rendered *has jurisdiction,* and that his determination on that question was reviewable by writ of habeas corpus.

The court in discussing this question said:

> "The District Judge, in exercising his jurisdiction under Section 1014 of the Revised Statutes to issue a warrant for the removal of Horner to the Southern District of Illinois, had a right to determine whether or not the offense was within the *jurisdiction* of the District Court of the United States for that district, and that determination was reviewable by habeas corpus." (Citing Callan v. Wilson, 127 U. S. 540.)

The Constitution, Article IV, Section 8, declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The first Congress under the Constitution, after prescribing the manner in which the records and judicial proceedings of the courts of any State should be authenticated and proved, enacted that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." (Rev. Stats. 905.) A great many

instances have been presented to the various courts of final resort in this country, and to this court, under these provisions of the Constitution and statute, and in no single instance, that I know of, has it ever been held that it was not open to the defendant, when sued in one State, upon the judgment and record, properly authenticated, from another State, that he could not show that the court which rendered the judgment was without jurisdiction, and in every case that I know of it has been held that that question of jurisdiction *was always* open for inquiry on the plea of *nul tiel* record. Thus it was held in Mills v. Duryee, decided in 1813, 7 Cranch. 481, that while the plea of *nil debet* could not be used, the plea of *nul tiel* record could.

In the case of D'Arcy v. Ketchem, decided in 1850, reported in 11 How. 165, it was held that the provisions of the Constitution and laws of the United States gave no effect in one State to judgments rendered in another State by a court *having no jurisdiction* of the cause or the parties.

In the case of Christmas v. Russell, decided in 1856, 5 Wall. 290, it was held that while it was open to a defendant sued on a foreign judgment to show that it had been obtained by fraud, that such a defense was not open where the judgment was rendered in another State, due entirely to the provision of the Constitution and statutes quoted. But in that case the court was careful to note the fact that the judgment must be rendered by a court of *competent jurisdiction*, and if so rendered, then it could not be collaterally impeached or called in question.

And in Bishop v. Wethered, decided in 1869, 9 Wall. 812, Justice Bradley delivering the opinion of the court,

held that it was open to a defendant to show that he was not served with process in England, where the judgment was rendered, and that the court was therefore *without jurisdiction* of the person.

And in Hanley v. Donohue, decided in 1885, 116 U. S. 1, and Wisconsin v. Pelican Insurance Co., decided in 1888, 127 U. S. 265, it was held that judgments recovered in one State of the Union, when proved in courts of another, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, *if* rendered by a court having *jurisdiction* of the cause and of the parties.

The old case of D'Arsey v. Ketchen, *supra,* has been followed a great many times by this court, and has never been doubted, and it seems to me it is bound to be the law upon the most elementary principles. A judgment rendered in a court which had no jurisdiction is bound to be void, therefore, there is no such judgment; therefore, it is not referred to by the Constitution and statute, when it is declared "that full faith and credit" shall be given. This has been often held and is a necessary consequence.

In this case, if the Middle District of Tennessee was without jurisdiction, then the indictment is *void,* and can not have any force whatever in *any* court, and is subject to inquiry in *any court* collaterally. The contention of the Government is that the jurisdictional fact can be conclusively shown by an indictment which may be void, which means that a void indictment can be conclusive evidence of its own validity. If this be true, then the old proposition of how a man may "lift himself over the fence by his boot straps" has been solved.

We do not think that any warrant can be found for action of the Judges, in the laws of Virginia, nor do we think that it is within the power of Virginia or any State to change the rule on this subject, and it is quite clear to my mind that it has not attempted to do so.

Suppose a man should be indicted in Fauquier County, Virginia, for murder, and arrested in Richmond. Is it not plain that it would be open to him to object to being taken to Fauquier County, by conclusively showing that he committed the act complained of, but in Rappahannock and not Fauquier County; that the act complained of and for which he was indicted was committed in Washington, Rappahannock County? Upon his showing that fact conclusively to the mind of the Judge, would that Judge perform his duty if he refused to release him on a writ of habeas corpus? There might be the gravest reasons why he would not care to be carried back to Fauquier County. It might be that the county was filled with the relatives and adherents and friends of the deceased, and that it would be very dangerous to him to send him back to Fauquier County. There would be no right in the court sitting in Fauquier County to try him, yet his life might be far more endangered from mob violence in that county, than it would be from a jury in the county in which the offense was committed, because it may be that he had a perfectly clear defense. The same thing is true in a case of this sort. Suppose a man is indicted in California, and arrested in Maine under Section 1014 of the Statutes. Can it be possible that the courts are justified in committing so gross and cruel an injustice as to send that man from Maine to California to be tried by a court which had no jurisdiction? It may be that a man when arrested might be in such a

delicate state of health that the trip across the continent would result in his death. It seems certain that unless the man was very rich, that to put him to the expense of going across the continent, with his witnesses, employing counsel, and getting ready for trial, would ruin him financially. These conditions have been commented upon by this court in several cases, and given as a reason why a man should not be sent out of his own jurisdiction to a foreign jurisdiction, particularly where the indictment charged no offense against the Government, and I submit that *exactly* the same reason applies with *equal* force where the court to which he is to be sent has *no jurisdiction to try him.*

Respectfully submitted,

JAMES P. HELM,

Counsel for George Braden.